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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-674

BALDWIN-LIMA-HAMILTON CORPORATION,
Petitioner,

—versus—

THE AETNA CASUALTY & SURETY CO., AMERICAN EMPLOYERS' INSURANCE COMPANY and EMPLOYERS' FIRE INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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IN THE

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No. _____

BALDWIN-LIMA-HAMILTON CORPORATION,
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v.

THE AETNA CASUALTY & SURETY CO., AMERICAN EMPLOYERS' INSURANCE COMPANY, and EMPLOYERS' FIRE INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Baldwin-Lima-Hamilton Corporation, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut, entered on July 5, 1972, affirming the judgment of the Superior Court for Fairfield County, at Stamford. The Courts below treated a certificate of the Connecticut Attorney General as a conclusive factual determination establishing that petitioner's suit is barred by the applicable statute of limitations. The certificate was obtained by re-

spondents' counsel from the Attorney General after the commencement of this litigation and without any hearing or notice to the petitioner.

OPINIONS BELOW

The determination of the Attorney General, dated May 3, 1962, entitled "Certified Statement of Final Settlement of the Contract" is not officially reported and appears as Appendix A, *infra.*

The memorandum of decision and judgment of the Superior Court are not officially reported and appear as Appendix B, *infra.*

The opinion of the Supreme Court of Connecticut, Conn. , A.2d , *Connecticut Law Journal,* July 18, 1972, p. 10 *et seq.,* together with that Court's judgment, appear as Appendix C, *infra.*

JURISDICTION

The judgment of the Supreme Court of Connecticut was entered on July 5, 1972. On September 20, 1972, the time within which to file this petition was extended to and including November 2, 1972, by order of Mr. Justice Marshall. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Was petitioner deprived of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States where respondents after the commencement of this litigation obtained from the Connecticut Attorney General, without hearing or notice, a factual

determination, the sole purpose and effect of which was to establish that petitioner's suit was barred by the applicable statute of limitations, and which determination was held by the courts below to be binding and conclusive upon petitioner, even though petitioner was never given an opportunity at any stage of the proceedings to show that the determination was incorrect?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fourteenth Amendment.

STATUTORY PROVISION INVOLVED

The statutes involved are Sections 7214 through 7216, inclusive, of the Connecticut General Statutes (Revision of 1949). Said statutes are set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

Petitioner, an unpaid subcontractor on a public works project, commenced this action against the sureties on a payment bond furnished by the prime contractor. The courts below held that petitioner's suit was barred by the provisions of Connecticut's "Little Miller Act"* (Connecticut General Statutes, Section 7214 *et seq.* [Revision of 1949]) because the action was commenced more than one year after the "date of final settlement" of the prime contract (Appendices B and C).

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*Connecticut General Statutes, Sections 7214 through 7216 are patterned after the provisions of 40 U. S. C. 270 (a) through (d) (commonly known as the "Miller Act") before said act was amended in 1959.

On January 31, 1956, the prime contractor entered into a contract with the State of Connecticut to construct a bridge over the Bridgeport Harbor on the Connecticut Turnpike. In compliance with the aforesaid statutes, the prime contractor, as principal, and the respondents, as sureties, executed and delivered to the State of Connecticut a payment bond in the full amount of the prime contract—$6,380,106. The bond provided that the sureties would pay subcontractors and materialmen on the project in the event that the prime contractor failed to do so. The payment bond incorporated by reference the provisions of the "Little Miller Act". Section 7215 of that act provides that no suit "shall be commenced after the expiration of one year after the date of final settlement of such contract". (Appendix D) Section 7216 authorizes the Attorney General of the State of Connecticut to issue "a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. . . ."

Subsequent to the execution and delivery of the bond, petitioner sold and delivered fabricated steel to the prime contractor for use in the bonded project. Thereafter a dispute arose between the petitioner and the prime contractor as a result of which the prime contractor withheld payment of $530,000 for steel sold and delivered to it by petitioner. Litigation ensued which resulted in the entry of judgment during January, 1963, in favor of the petitioner against the prime contractor in the Supreme Court for the State of New York in the amount of $530,000, plus $175,960 interest—a total of $705,960.

The prime contractor is insolvent. Petitioner has not been paid.

On March 23, 1962, petitioner commenced this action to recover against the sureties on the bond. After suit was commenced, an attorney representing the respondents, with-

out notice to or knowledge of petitioner, made application to the Highway Department for a certified statement of the "date of final settlement" with respect to the contract and obtained a statement from the Department indicating that final settlement occurred on April 14, 1960. Respondents' counsel then prepared a form of certificate containing the April 14, 1960 date and had it hand delivered to the Attorney General's office, together with a copy of the Highway Department's statement. Thereupon someone in the Attorney General's office stamped respondents' certificate with the facsimile signature of the Attorney General and returned the document to respondents. This was done without notifying petitioner and without conducting any investigation of the facts. Respondents then filed their answer in this action annexing the Attorney General's certificate. The courts below held that the Attorney General's certificate was a conclusive determination of fact as to the final settlement date and refused to review said determination on the merits. (App. B-5 and C-7)

At no point during the administrative proceedings was petitioner afforded an opportunity to be heard with respect to the establishment of a final settlement date. Had petitioner been accorded a hearing, it would have shown the Attorney General that as a matter of law the correct definition of the date of final settlement was the date of the final administrative determination with respect to the amount due the prime contractor. *Pittsburgh Plate Glass Co.* v. *Dahm,* 159 Conn. 563, 567-8, 271 A. 2d 55, 57 (1970) [Final settlement cannot have occurred where there are outstanding claims for extras.] Petitioner would have further demonstrated that the uncontroverted facts establish that this event occurred when the prime contractor's claim for extras was administratively determined on April 3, 1961,

less than one year prior to the commencement of this action.*

The courts below refused to set aside the Attorney General's *ex parte* administrative determination of the date of final settlement, and instead treated it as conclusive. Accordingly, even though petitioner's suit on the bond was actually timely, it was effectively barred by the erroneous certificate of the Attorney General. As a result petitioner has been deprived of its contractual rights against the sureties on their bond without due process of law.

Manner In Which The Federal Question Was Raised Below

The federal question was presented to the trial court in the pleadings. Petitioner's Fourth Reply in Avoidance of the First Special Defense asserts that the State's "methods in establishing the alleged date of 'final settle-

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*Appendix E contains findings of fact made by the trial court pertinent to the question of the date of final settlement. The facts reflected in Findings 25 through 36 (App. E-1—E-4) were not presented to the unidentified wielder of the Attorney General's rubber stamp. It is undisputed that the last administrative determination under the contract was the denial of the prime contractor's claim for extras on April 3, 1961. Only four cases have been found which deal with the effect of a pending claim for extras upon the date of final settlement under the Miller Act or a comparable state statute. *Pittsburgh Plate Glass Co.* v. *Dahm*, supra; *United States for the Use of Soda* v. *Montgomery*, 269 F. 2d 752 (3d Cir. 1959) [Contract not finally settled until pending claim under changes article had been administratively determined.]; *United States Fidelity & Guaranty Co.* v. *Hendry*, 391 F. 2d 13 (5th Cir. 1968) [Final settlement date revised to reflect subsequent determination of claim for extras.]; *U. S. for the Benefit and Use of Berkowitz* v. *Frankini Construction Co.*, 139 F. Supp. 153 (D. Mass. 1956) [Where claim for extras was administratively determined more than one year prior to suit, appeal to Appeals Board did not toll the statute.] Accordingly, all four cases either support or are consistent with petitioner's contention that final settlement occurred in this case on April 3, 1961. Respondents have found no case which indicates that final settlement could have occurred prior to the administration determination of the claim for extras.

ment' herein deprived plaintiff of its rights to due process of law within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States of America." (App. F-1—F-2) Petitioner's written claims of law submitted to the trial court identify the constitutional claim as the deprivation of plaintiff's contractual rights under the payment bond by an administrative determination made without notice to the petitioner, a person known to be interested in the determination. (App. F-2—F-3)

The issue was tendered to the Connecticut Supreme Court by assignment of errors and was briefed. (App. F-4—F-6) The Connecticut Supreme Court brushed aside the constitutional claim apparently on the ground that the certificate was not really a quasi judicial administrative determination and its correctness was immaterial. (App. C-14—C-15)

REASONS FOR GRANTING WRIT

It is a clear violation of due process of law when a person vitally affected by an administrative or judicial action is denied notice and/or an opportunity to be heard. In *Fuentes* v. *Shevin*, 407 U. S. 67, 80-81 (1972), this Court said:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property. . . .

> "... It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 170-172 (Frankfurter, J., concurring)."

The courts below have construed Connecticut General Statutes, Section 7216 to preclude judicial review of the Attorney General's "conclusive" administrative determination. The Attorney General made his "conclusive" determination without hearing or notice to petitioner. At no time during the administrative or judicial aspects of the proceedings below was petitioner afforded an opportunity to be heard with respect to the establishment of a date of final settlement.

It is well established that a binding determination cannot be made unless an interested party is afforded "a chance to present [his] evidence and arguments". *Blonder Tongue Laboratory, Inc.* v. *University of Illinois*, 402 U. S. 313, 329 (1971). Judicial review is not always required but in its absence, notice and hearing, one of "the inexorable safeguards which due process affords", must be available at the administrative level. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 72 (1935), Brandeis, J. concurring; see *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96 (1963).

Applying this concept, this Court upheld a statute providing for conclusive administrative determination of questions of title to federal lands, stating:

> "Due process in such a case implies notice and a hearing. But this does not require that the hearing must be in the courts." *Orchard* v. *Alexander,* 157 U. S. 372, 383 (1895), cited in *Best* v. *Humboldt Mining Co.,* 371 U. S. 334, 338 (1963).

Whether a hearing is required prior to an initial administrative determination, or at some later time, is a question dependent upon "the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action". *Goldberg* v. *Kelly,* 397 U. S. 254, 263 (1970). However, at some point, an interested party must be heard. Due process requires that "there be an opportunity to present every available defense". *American Surety* v. *Baldwin,* 287 U. S. 156, 168 (1932); *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152-3 (1941). No such opportunity was afforded petitioner in the proceedings below.

The necessity of strict adherence to the notice and hearing principles of due process is dramatically demonstrated by the facts of this case. After petitioner commenced this action, Counsel for respondents wrote the Highway Department and requested a certificate of the date of final settlement. A Highway Department engineer responded by letter, stating that final settlement occurred on April 14, 1960, a date petitioner claims is erroneous. Thereupon counsel for respondents prepared a certificate for the Attorney General's signature, complete in all respects, including the April 14, 1960 date of final settlement. Respondents hand delivered this form of certificate, together with the Highway Department's letter to the Office of the Attorney General, where an unidentified person literally rubber-stamped the document prepared by respondents with the facsimile signature of the Attorney General. The Attorney General made no investigation to

verify the correctness of the April 14, 1960 date, and he was not in possession of the facts upon which petitioner bases its claim that the correct date of final settlement was April 3, 1961. Nevertheless, that document was held to establish conclusively that petitioner's suit on the bond was untimely.

No case, under either the Miller Act or comparable state statutes, has considered the question of whether a materialman is entitled to notice and hearing in connection with the certifying authority's determination of the date of final settlement of a public contract. The leading case on the conclusiveness of a Comptroller General's certificate under the Miller Act is *Peerless Casualty Co. v. United States*, 241 F. 2d 811 (1st Cir. 1957), cited by the courts below. (App. B-5, C-6) In *Peerless* the court held that where Congress had provided for a conclusive administrative determination, such determination could not be set aside except for fraud or bad faith. 241 F. 2d at 817.

This standard of review was based on a line of cases culminating in *Wunderlich* v. *United States*, 342 U. S. 98 (1951), which involved contract clauses making a government official an arbiter of facts. None of these cases involved any claim that a party affected by the determination had not been given notice or an opportunity to present his side of the story to the government official.*

The court in *Peerless* likewise did not deal with the question of notice and hearing with respect to the establishment of a settlement date. It brushed aside the question of constitutionality with the statement that the provisions of the Miller Act must be read into the bond and "the parties agreed,

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*The government "disputes" clause involved in *Wunderlich* expressly provided for an opportunity to be heard by way of administrative appeal within contracting agency. The "disputes" clause presently in use spells out the contractor's right to procedural due process in some detail. ASPR ¶ 7-103.12.

as they had a right to do, that the Comptroller General's certificate would be conclusive of the final settlement date." 241 F. 2d at 817.

The fact that parties agree to accept the determination of a third party arbiter as conclusive obviously does not constitute a waiver of the right to notice of an impending determination or an opportunity to be heard by the arbiter. The right to notice and hearing have always been essential elements of a binding arbitration. *Lutz* v. *Linthicum,* 8 Pet. 165, 178-9, 11 U. S. 58, 61 (1834). The constitutional right to notice and hearing may be expressly waived, but cannot be waived by implication. *D. H. Overmyer Co., Inc.* v. *Frick Company,* 405 U. S. 174 (1972).

There cannot be a valid conclusive administrative or judicial determination without such notice and hearing. *United States* v. *Jones,* 109 U. S. 513, 519 (1883) [Condemnation]; *Japanese Immigrant Case,* 189 U. S. 86, 100-102 (1903) [Deportation]; *Londoner* v. *Denver,* 210 U. S. 373, 386 (1903) [Real Estate Tax Assessment]; *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91 (1913) [Railroad Grade Crossing Elimination]; *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963) [Right to Practice Law]; *Armstrong* v. *Manzo,* 380 U. S. 545 (1965) [Adoption]; *Goldberg* v. *Kelly,* 397 U. S. 254, 267 (1970) [Welfare Termination].

The Connecticut Supreme Court concluded that "Final settlement is a matter of fact, not a question of law." App. C-8. This factual determination was a matter of great importance to petitioner. It was a matter of no importance to the Attorney General. It had no effect whatever upon the rights or liabilities of the State of Connecticut. As a result, the matter was treated with complete indifference by personnel in the Attorney General's office. In cases such as this where the Legislature has established a government

official as the arbiter of private rights, it is essential for the protection of persons affected by the arbiter's determinations that they be accorded fundamental procedural due process. Important questions of fact such as the one involved in this case may not be decided without notice and a meaningful opportunity to be heard. *Goldberg* v. *Kelly, supra,* 397 U. S. at 267, 269.

Since petitioner was never accorded procedural due process with respect to the Attorney General's determination of the date of final settlement, that determination is void. The certificate evidencing the determination should not have been considered by the courts below. Since the courts did consider the certificate and in fact accorded it conclusive effect, this court must wipe the slate clean by setting aside all administrative and judicial proceedings below and restoring petitioner to the position it would have occupied had due process of law been accorded in the first place. *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965).

CONCLUSION

In conclusion, on the facts and law, petitioner respectfully urges this Court to grant this Petition for the reason that the petitioner was deprived of its property without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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Appendix A

CERTIFIED STATEMENT OF DATE OF FINAL SETTLEMENT OF CONTRACT

Having been specially designated to make such certified statement pursuant to Section 7216 of the General Statutes of Connecticut, Revision of 1949, (Section 49-43 in the Revision of 1958), I do hereby certify, in accordance with the provisions of said Section 7216 of the Genenal Statutes of Connecticut, Revision of 1949, (Section 49-43, Revision of 1958), that the date of final settlement of the contract, dated January 31, 1956, between the State Highway Commissioner, acting as agent for the State of Connecticut, and Terry Contracting, Inc. for construction of Superstructure, Bridgeport Harbor Bridge, on Conneticut Turnpike, in the Town of Bridgeport, Project Number 311-02, S.W.O. Number 311-04, was April 14, 1960.

Dated at Hartford, Connecticut this 3rd day of May, 1962.

Albert L. Coles
Attorney General of the State of Connecticut
by ALBERT L. COLES

Appendix B

MEMORANDUM OF DECISION

On March 23, 1962, the plaintiff, a corporation organized under the laws of Pennsylvania, caused service of the writ, summons and complaint in this action to be legally served upon the defendants, three insurance companies doing business in this state. Attached to the complaint, was a photostatic copy of a bond, marked "Exhibit A" which had been executed by the defendants as sureties on January 31, 1956. The plaintiff's action is predicated upon the bond.

After considerable legal skirmishing, the plaintiff filed a substituted complaint dated October 31, 1967 in which it seeks damages of $1,500,000.00. The defendants filed a substituted answer dated November 13, 1967 and two special defenses. The plaintiff by substituted reply dated November 15, 1967, denied both of the defendants' special defenses and in addition included seven replies in avoidance of the first special defense. The pleadings were closed by the defendants' rejoinder dated November 25, 1967.

The case was referred to me and scheduled for trial in the fall of 1968. The parties submitted trial briefs outlining their claims and at the conclusion of the trial their claims of law in writing. There was relatively little oral evidence introduced during the trial as the parties had stipulated as to facts and had also stipulated as to the documents. The parties reserved the right to question the relevance of the facts as well as the documents.

This litigation is a result of the construction by the State of Connecticut of the bridge over Bridgeport harbor on the Connecticut Turnpike. The contract for the super-

structure of the bridge was executed on January 31, 1956 by the highway commissioner for the state and by Terry Contracting, Inc., of New York City in which Terry agreed to fulfill the contract at the price of $6,380,106.00. Simultaneously with the execution of the contract, Terry filed two bonds with the state. Each bond was for the full amount of the contract. One bond was a performance bond under which the sureties were liable if Terry did not fulfill its contractual obligation. That bond is not involved in this suit. The other bond was a payment bond, required by statute for the protection and payment of subcontractors and other materialmen on public works projects of the state or its subdivisions. That is the bond, the protection of which the plaintiff seeks. It is akin to the mechanics lien which contractors, sub-contractors and materialmen have in work on private buildings. Norwalk v. Daniel, 143 Conn. 85, 86. The sureties on both bonds are The Aetna Casualty and Surety Company, American Employers' Insurance Company and The Employers' Fire Insurance Company.

The plaintiff sold and delivered steel to Terry which was used in the bridge construction between June 14, 1957 and December 17, 1957 for which it was not paid. In a judgment on a counterclaim filed by plaintiff on March 5, 1959 in a suit by Terry in the Supreme Court in New York, the balance owed to plaintiff was determined to be $530,000.00 which with interest of $175,960.00 to the date of judgment on October 14, 1963 amounted to a total indebtedness of $705,960.00, none of which has been paid. That amount with interest from the date of that judgment, is what the plaintiff claims the defendants should pay under the provisions of the payment bond.

The payment bond contains the following concluding provision: "Now, therefore, if the said principal shall well

and faithfully make payment for all materials and labor used or employed in the execution of such contract, to the extent required by Chapter 362, Sections 7214, 7215 and 7216 of the 1949 Supplement to the General Statutes, then this obligation shall be null and void, otherwise it shall remain and be in full force and effect." The use of the word "Supplement" is obviously a mistake as neither of these three sections were amended in 1949. I shall consider it as reading "1949 Revision of the General Statutes." Section 7214 has not been amended and is now Sec. 49-41 of the 1960 revision. Section 7215, as § 49-42, was amended in 1961 and Section 7216, as § 49-43 was amended in 1959. The interpretation and application of § 7216 as it was worded in 1956 when the Terry contract was executed controls the determination of the plaintiff's cause of action. It then read: "The attorney general is authorized and directed to furnish to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution and delivery of the original and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties . . ." This section and § 7214 and § 7215 follow the tenor of the Heard Act and the Miller Act adopted by Congress in 1935 to supplant the Heard Act. See International Harvester Co. v. L. G. DeFelice & Son, Inc., 151 Conn. 325, 332. In Miller, the Comptroller General was the officer designated to perform the duties assigned to the Attorney General in § 7216. In Miller as well as in § 7215, suit had to be com-

menced within one year after the date of final settlement of the contract.

The attorney general on May 3, 1962 furnished to the attorney for the defendants, a certified statement of the date of final settlement of the Terry contract as being April 14, 1960. The duties conferred upon the attorney general by § 7216 are ministerial in character, Norwalk v. Daniele, 143 Conn. 85, 88, although in determining the date of final settlement he exercises a quasi-judicial function as to the existence of a state of facts. Plukowsky v. New Haven, 151 Conn. 337, 347.

The date of final settlement, as determined by the attorney general, happens to coincide with the date of final estimate on the Terry contract as computed by the highway department. That in and of itself does not make the attorney general's decision illegal. In 1958, the department adopted an amendment to its standard specifications defining the date of final estimate as the date of final settlement and while there was no specification of that nature in 1956 when Terry's contract was executed, it is not surprising that in the quasi-judicial determination of the date, the attorney general agreed with the department's procedure and result.

So far as we know, the question of the date of final settlement has not arisen in the courts of this state. However, under the Heard Act the identical question was answered in United States, for Use of Wennemer Const. Co., Inc. v. Arnold, et al, 268 F. 130, 135 (Conn.); Arnold et al v. United States, for Use of W. B. Guimarin & Co., 280 F. 338, 341; Illinois Surety Co. v. United States, 240 U. S. 214, 221, 36 S. Ct. 321, 60 L. Ed. 609 wherein Justice Hughes in the opinion of the Court stated that the date of final settlement is the date of the appropriate administrative determination with respect to the amount due under

the contract and this was followed in Globe Indemnity Co. v. United States, 291 U. S. 476, 483, 54 S. Ct. 499, 78 L. Ed. 924. This definition has been uniformly followed in the Federal cases under the Miller Act as well. See cases cited under note 12 in 40 U. S. C. A. page 475. Both Nebraska and Utah, under statutes similar to ours, hold that "final settlement" is the date on which the state administratively determines the amount due the contractor. Westinghouse Electrical Supply Co. v. Brookley, 176 Neb. 807, 127 N. W. 2d 465; American Oil Company v. General Contracting Corp., 17 Utah 2d 330, 411 P. 2d 486. April 14, 1960 was the date of final settlement of the Terry contract and it is conclusive on the parties to this suit. U. S. F. & G. Co. v. Hendry Corp., 391 F. 2d 13, 15.

As the plaintiff's suit was not instituted within one year of that date, it did not comply with the statute which created the right of action under it. Peerless Casualty Co. v. United States for the Use of and Benefit of Bangor Roofing and Sheet Metal Co., 241 F. 2d 811.

The bond which Terry furnished for payment to subcontractors and materialmen was a statutory bond. Metropolitan Casualty Co. v. Billings, 150 Conn. 603, 607. The fact that it was executed under seal did not extend the time within which suit had to be instituted.

I do not feel it necessary to minutely dissect the arguments and claims advanced by the plaintiff. Had local counsel been consulted earlier, the result might well have been different. They have ably handled a difficult situation.

Judgment is rendered for the defendants.

JAMES E. MURPHY,
State Referee.

Filed Aug. 19, 1969.

Appendix B

STATE OF CONNECTICUT

No. 4782

BALDWIN-LIMA-HAMILTON CORPORATION of Philadelphia, Pennsylvania, *vs.* THE AETNA CASUALTY & SURETY CO., of Hartford, Conn., AMERICAN EMPLOYERS INSURANCE CO., & THE EMPLOYERS' FIRE INSURANCE CO., both of the State of Massachusetts.	Superior Court, At Stamford County of Fairfield, August 19, 1969.

Present: HON. JAMES E. MURPHY, State Referee

Judgment

This action by writ and complaint dated March 22, 1962, claiming $534,328.18 damages, together with interest and costs of this action, came to this Court on the first Tuesday of May, 1962, thence to October 13, 1967, when an amendment to the complaint was filed, claiming $1,500,000.00 damages, thence to December 8, 1967, when said case was referred to the Hon. Patrick B. O'Sullivan, State Referee, for trial and Judgment, thence to July 25, 1968, when a motion to revoke reference and re-refer was granted, and said case was referred to the Hon. James E. Murphy, State Referee, for trial and Judgment, and thence to the present time.

The Referee, having heard the parties, finds the issues for the defendants.

Whereupon it is adjudged that the defendants recover of the plaintiff, damages and costs, taxed at $.

By the Court,
JOHN J. P. RYAN,
Clerk.

Appendix C

SUPREME COURT OF CONNECTICUT

May Term, 1972

BALDWIN-LIMA-HAMILTON CORPORATION *v.* THE AETNA CASUALTY AND SURETY COMPANY ET AL.

Action by a subcontractor on a payment bond issued by the defendants for the balance due for materials furnished on a construction contract, brought to the Superior Court in Fairfield County at Stamford and referred to *Hon. James E. Murphy,* state referee, who, acting as the court, rendered judgment for the defendants, from which the plaintiff appealed to this court. *No error.*

Francis J. McNamara, Jr., with whom were *John F. Spindler,* and, on the brief, *Samuel V. Schoonmaker III* and *Paul E. Knag,* for the appellant (plaintiff).

Donald F. Keefe, with whom was *Elmer W. Beasley,* for the appellees (defendants).

RYAN, J. This is an action brought by the plaintiff Baldwin-Lima-Hamilton Corporation, hereinafter referred to as Baldwin, on a payment bond issued by the defendants The Aetna Casualty and Surety Company, a Connecticut corporation, and the American Employers' Insurance Company and The Employers' Fire Insurance Company, both Massachusetts corporations, seeking payment of the balance due for materials furnished on a construction contract. The referee, acting as the court, rendered judgment for the defendants and the plaintiff has appealed to this court.

This action arose out of the construction of a bridge over Bridgeport harbor on the Connecticut Turnpike. The contract for the superstructure of the bridge was executed

on January 31, 1956, by the highway commissioner for the state and by Terry Contracting, Inc., of the city of New York, hereinafter referred to as Terry. At the same time Terry filed the bond in question with the state. This was a payment bond required by statute for the protection and payment of subcontractors and materialmen on public works projects of the state. The defendants were sureties on the bond. In its substituted complaint the plaintiff alleged that between June 14, 1957, and December 17, 1957, it sold and delivered to Terry steel which was used in the bridge construction and that Terry has refused to pay the bill due in the sum of $534,328.18 and accordingly, the conditions of the bond were breached: that this sum is due and owing from the defendants; that although demand has been made on the defendants they have failed and refused to pay. It was also alleged that on October 14, 1963, judgment was rendered against Terry on a counterclaim filed by the plaintiff in a suit brought by Terry in the Supreme Court in the state of New York. The amount of the judgment was $530,000 plus interest of $175,960, a total of $705,960. The defendants have stipulated as to the essential factual allegations of the complaint, but interposed two special defenses, one of which is pertinent to this appeal wherein they allege that the statutory period during which the plaintiff could have brought this action has expired since this suit was not commenced within one year from the date of "final settlement" by the state of the Terry contract. Rev. 1949. §§ 7215, 7216. The defendants contend that a document entitled "Certified Statement of Date of Final Settlement of Contract" executed by the attorney general of the state, conclusively establishes the "final settlement date" as April 14, 1960. The plaintiff's reply in avoidance alleges that April 14, 1960, is not the final settlement date

since Terry, the contractor, had made a claim for extra work which was pending on the date and which was not finally refused by the state until April 3, 1961.

The gravamen of the plaintiff's appeal is an attack on the conclusions of the referee. The plaintiff contends that the attorney general's certification of April 14, 1960, as the date of final settlement is erroneous as a matter of law, and, in such a case, the court is not bound to accord the certificate conclusive effect. To review these claims it is necessary to examine the provisions of §§ 7214-7216 of the 1949 Revision (now §§ 49-41—49-43 of the General Statutes) which were in effect at the time the contract was made in the present case together with some of the additional subordinate facts from which the referee reached his conclusions.

Sections 7214-7216 are designed to protect subcontractors and materialmen on public works projects. Section 7214 requires that on any contract for the construction of any public work in this state, the general contractor must furnish to the state a payment bond with surety in the amount of the contract. Section 7215 permits those furnishing labor and materials to sue on the bond if they have not been paid within sixty days from the date on which the last of their labor was performed or materials supplied. Subsection (b) of § 7215 provides that "no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract."[1] Section 7216 establishes the procedure whereby the attorney general will furnish to those authorized to sue under the

[1]The statute was amended in 1969 by striking out the words "date of final settlement of such contract" and substituting the words "day on which the last of the labor was performed or material was supplied by him." The amendment has no bearing on the present appeal.

provisions of § 7215 a certified statement of the date of final settlement of the contract. It provides that this statement "shall be conclusive as to such date upon the parties."

The referee found that none of the documents which comprise the contract between Terry and the state, including the payment bond, contains a reference to or definition of the term "final settlement." After the contract was signed, the highway department altered the method by which it determined the final settlement date of the contract, equating it with the date of the final estimate. This was never made a part of the Terry contract. Previously, the attorney general had equated "final settlement" with final payment. On April 14, 1960, the engineer of contracts and construction of the highway department approved the final estimate in the Bridgeport harbor project. On April 25, 1960, the state issued a "final payment" check to Terry. Terry obtained permission from the state to cash this check subject to a claim for extra work which it alleged it had performed. On December 30, 1960, Terry submitted its claim for extras which was denied by the state on April 3, 1961.

The referee also found that in February and March, 1959, the plaintiff notified the defendant and the highway department that it had not been paid and that it might be necessary for it to file a claim under the payment provision of the bond. On March 10, 1959, the plaintiff wrote to the attorney general and asked for a copy of the bond. This was obtained two weeks later. After the institution of this action and at the request of the defendant, the attorney general, on May 3, 1962, determined that April 14, 1960, was the date of final settlement of the Terry contract and certified this as provided for in § 7216. This date coincides with

the date of approval of the final estimate on the Terry contract by the highway department. Prior to the commencement of this action, the plaintiff was not notified that a final settlement date had been established. The certificates of final settlement are issued on request but there was no evidence that the plaintiff had requested the certificate before starting this action.

The statutes involved in this case are similar to the federal statutes popularly known as the Miller Act. 40 U. S. C. §§ 270a-270d. For this reason the decisions of the federal courts relative to the Miller Act are helpful. *International Harvester Co.* v. *L. G. DeFelice & Son, Inc.*, 151 Conn. 325, 333, 197 A.2d 638. In the recent case of *Pittsburgh Plate Glass Co.* v. *Dahm*, 159 Conn. 563, 271 A.2d 55, we adopted the long-standing federal definition of "final settlement" which was then found in both the state and federal statutes.[2] It does not mean final payment; rather it is " 'the administrative determination by the officer having the execution of the work in charge that it has been performed and his finally fixing the amount due'; *R. P. Farnsworth & Co.* v. *Electrical Supply Co.*, 112 F. 2d 150, 152 (5th Cir.); *United States* v. *Arthur Storm Co.*, 101 F. 2d 524, 526 (6th Cir.); or, as stated by the United States Supreme Court, the date of 'final settlement' is the date on which 'so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority.' *Illinois Surety Co.* v. *United States*, 240 U. S. 214, 221, 36 S. Ct. 321, 60 L. Ed. 609; *United States Fidelity & Guaranty Co.* v. *United*

[2]The federal statute also was amended by deleting the words "date of final settlement of such contract" and substituting the words "day on which the last of the labor was done or performed by him or material was furnished or supplied by him." 40 U. S. C. § 270b.

States, 65 F. 2d 639, 641 (9th Cir.)." *Pittsburgh Plate Glass Co.* v. *Dahm,* supra, 567.

The plaintiff does not disagree with this definition. It contends, however, that when applied to the facts of this case, it is apparent that the final settlement did not occur on April 14, 1960, since Terry had an outstanding claim for extra work on that date. Nevertheless, in this case we have a certified statement by the attorney general of the final settlement date. The statute makes the date so certified conclusive on the parties. Under the Miller Act, the certification by the federal officer corresponding to the attorney general, namely, the comptroller general, similarly is made conclusive on the parties as to the final settlement date. Because of this, the federal courts have implemented the legislative intent by according a very restricted review to the action of the comptroller general. " 'It is necessary to establish fraud or such gross mistake as would imply bad faith before the certificate of the comptroller general can be set aside.' " Otherwise his is an act of "absolute, unreviewable discretion." *United States Fidelity & Guaranty Co.* v. *Hendry Corporation,* 391 F. 2d 13, 15 (5th Cir.). "The conclusive determination of the final settlement date of a contract by the Comptroller General as provided by 40 U. S. C. A. § 270c is an essential prerequisite to the running of the one year statute of limitations provided in 40 U. S. C. A. § 270b(b). It seems that Congress sought to expedite the determination of these matters by placing them in the hands of the Comptroller General who is best equipped to deal with them. If it wanted to extend the reviewability thereof by the courts, it could have employed language to that effect." *Peerless Casualty Co.* v. *United States,* 241 F. 2d 811, 816 (1st Cir.). "The courts do not inquire whether there has in fact been a final settle-

ment of a contract and it would obviously be contrary to the interests of material men, laborers, and others to have a court make such an inquiry into the validity of the Comptroller General's determination, for this would undo the very purpose which Congress had in mind when it allowed claimants to bring suit without necessarily waiting for final settlement of absolutely every claim which might be made in connection with the contract." *United States* v. *Frankini Construction Co.*, 139 F. Sup. 153, 155 (D. Mass.).

There is nothing in our statute from which we can infer an intent on the part of the legislature which is any different from that of the Congress of the United States in enacting the Miller Act. The purposes served by the two acts are parallel. The procedures are practically the same. Furthermore, the language is almost identical. In each act the determination of the administrative officer as to the final settlement date is made conclusive on the parties. We cannot ignore the plain and obvious import of the legislature's action in choosing the Miller Act as a model for our own statute and the purposeful selection of the word "conclusive" to describe the effect of the attorney general's certification of the final settlement date.

The plaintiff cites cases where we have held that a statutory provision making an administrative determination "final" or "conclusive" does not preclude an attack on the ground that an error of law has been committed. See *Newington* v. *Mazzoccoli,* 133 Conn. 146, 48 A. 2d 729; *Equitable Life Assurance Society* v. *Slade,* 122 Conn. 451, 190 A. 616; *Connecticut Mutual Life Ins. Co.* v. *Rogers,* 113 Conn. 14, 154 A. 246. In the case before us these cases are inapposite. In certifying a date as the date of final settlement, the attorney general is not called on to

apply some external, legal standard to a set of facts, nor is it possible for him in this situation to act in a way which violates the provisions of other statutes. Final settlement is a matter of fact, not a question of law. It does not depend on the agreement or concurrence of other parties. It refers to unilateral administrative action which of necessity must be taken without reference to § 7215 of the Revision of 1949. The state at some point must determine for purposes of payment what it feels it is obligated to do to discharge its obligation under the contract. What, in fact, it is required to pay is not in question in establishing a final settlement. The legislature has not provided for an appeal from the attorney general's certificate since, inter alia, the correctness of his decision is not at issue. There would be very little, if anything, for us to review. The standard requiring fraud or such gross mistake as to imply bad faith is adequate to protect against action which is totally arbitrary or which is designed to injure someone in the exercise of his legal rights.

When the plaintiff was not paid within sixty days from the day it last supplied steel to Terry, the statute authorized it to seek redress against the bond. The plaintiff obtained this right on February 15, 1958. At no time thereafter did the plaintiff attempt to avail itself of the statutory procedure through which it could have learned when its right to sue would terminate. In February and March, 1959, the plaintiff notified the state and the defendant that it might have to bring an action on the bond. In April, 1959, the plaintiff utilized § 7216 of the Revision of 1949 to obtain from the attorney general certified copies of the Terry contract and bond in order to get the benefit of the provision in that statute which makes such certified copies prima facie evidence of the contents, execution and

delivery of the original. Yet, it was not until March 22, 1962, that the plaintiff started this suit. We know of no rule of general application which requires that notice be given of the day the Statute of Limitations begins to run. Here, for all intents and purposes, the plaintiff had three years in which to bring its suit. For some reason which does not appear of record it failed to do so.

The conclusions of the referee cannot be disturbed.

There is no error.

In this opinion the other judges concurred.

Appendix D

CONN. GEN. STATUTES (1949 REV.)

SEC. 7214. *Public structures. Bonds for protection of employees and material men.* Before any contract exceeding one thousand dollars in amount for the construction, alteration or repair of any public building or public work of the state or of any subdivision thereof is awarded to any person, such person shall furnish to the state or such subdivision a bond in the amount of the contract which shall be binding upon the award of the contract to such person, with a surety or sureties satisfactory to the officer awarding the contract, for the protection of persons supplying labor or materials in the prosecution of the work provided for in such contract for the use of each such person. Nothing in sections 7214 to 7216, inclusive, shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to the bond herein referred to.

SEC. 7215. *Suit on bond; when and how brought.* (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under the provisions of section 7214 and who has not been paid in full therefor before the expiration of a period of sixty days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided

any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing such payment bond shall have a right of action upon such payment bond upon giving written notice to such contractor within sixty days from the date on which such person performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence. (b) Every suit instituted under this section shall be brought in the name of the person suing, in the superior court for the county where the contract was to be performed, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. (c) The word "material" as used in sections 7214 to 7216, inclusive, shall be construed to include the rental of equipment used in the prosecution of work provided for in such contract.

SEC. 7216. *Certified copies of bonds and contracts; certified statements.* The attorney general is authorized and directed to furnish to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents,

execution and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the attorney general shall fix to cover the cost of preparation thereof.

Appendix E

PERTINENT EXCERPTS FROM FINDINGS OF THE TRIAL COURT

[R. 37] 25. The Engineer of Contracts and Construction of the Highway Department approved the final estimate on the Bridgeport Harbor Bridge project on April 14, 1960.

26. The final estimate on a Connecticut Highway Department project is a quadruplicate document prepared within the department from all construction orders and relevant records to determine the amount of final payment due under the project contract.

27. The State of Connecticut issued a "final payment" check to Terry on or about April 25, 1960.

28. On April 25, 1960 an attorney representing Terry wrote the following letter to the Highway Department with respect to the Bridgeport Harbor Bridge project:

> "Recently our client, Terry Contracting, Inc., received its final check for the above named project, and has asked that we request your permission for it to cash the same without prejudice to its claim arising out of the above-named project.
>
> If this request is granted Terry Contracting Inc. agrees to present its claims to your department for review and possible settlement prior to any legal action. This submission to you would be within eight (8) months from the date of the cashing of its final check."

29. On April 27, 1960 the Highway Department responded to Terry's letter of April 25, 1960 (Ex. DD-1) as follows:

> "This is in reply to your letter of April 25, 1960 concerning your request for permission for Terry Contracting, Inc. to cash the final payment check on project 311-02 without prejudice to its claim.
>
> This permission is granted providing:
>
> [R. 38] A Your claim is submitted to the department formally in writing with each claim described in full and complete detail by November 1, 1960.
>
> B The department is given until February 1, 1961 to review your claim in an attempt at amicable settlement.
>
> C In the event that amicable settlement cannot be reached, you commence your lawsuit by March 1, 1961.
>
> D If legal action is not brought by March 1, 1961, you waive all further claims against the state on the above noted project.
>
> Your acknowledgment of this letter is requested."

30. The April 27, 1960 letter from the Highway Department (Ex. DD-2) was acknowledged by the attorneys for Terry on May 3, 1960.

31. Thereafter in an exchange of correspondence the Highway Department extended the time for submission of the Terry claim through December 31, 1960.

32. On December 30, 1960 Terry submitted its claim asserting a right to payment for extra work undertaken by Terry pursuant to the terms of the January 31, 1956 agreement.

33. On January 5, 1961 the Highway Department submitted Terry's claim (Ex. DD-8) to the consulting engineer on the Bridgeport Harbor Bridge project together with a cover letter which reads in part as follows:

> "The Highway Department is presently reviewing this claim and if it is determined that the State does have a responsibility, an attempt will be made to settle the claim. In the event, however, that a settlement cannot be reached, we may find it necessary to request your services to assist us in our defense against any future litigation."

[R. 39] 34. On April 3, 1961 the Highway Department wrote the attorneys for Terry as follows:

> "After a review of the claim submitted by Terry Contracting, Inc. relative to work on the above-quoted project, it is our determination that the State has complied with the provisions contained in the contract and that we are unable to make any additional payments to your clients within these provisions.
>
> We do not believe that we can justify requesting the Attorney General to recommend compromise settlement of this claim based on the information that has been submitted to us."

35. Terry sued the State of Connecticut in the Superior Court for Hartford County for extras it claims the State of Connecticut owes it.

36. Section 1.04.04 of Standard Specification Form 808 (Ex. C) reads as follows:

> "1.04.04-Extra Work: Unforeseen work made necessary by changes in plan or work necessary to complete the improvement, for which no price is provided, in the contract, shall be done in accordance with the requirements of the specifications and as directed by the Engineer."

[R. 41] 45. After plaintiff commenced this action, Elmer W. Beasley, an attorney in the employ of the defendant Aetna, wrote the Highway Department on March 27, 1962 requesting a certified statement of the date of final settlement of the contract between Terry and the State.

46. On March 29, 1962 the Highway Department responded by letter (Ex. GG) to Mr. Beasley as follows:

> "Pursuant to the request contained in your letter dated March 27, 1962, and addressed to Mr. M. A. Tyack, we hereby certify that the final settlement date of this contract was April 14, 1960.
>
> We trust the above will satisfy your requirements.
>
> Very truly yours,
> Howard S. Ives.
> State Highway Commissioner
>
> (Signed) by: Walter T. Schuler
> Chief Engineer"

47. On April 4, 1962 Mr. Beasley responded to the Highway Department by letter (Ex. KK) as follows:

> "In response to my request of March 27 for a certified statement of the date of final settlement of

this contract, you certified that the date was April 14, 1960, by letter dated March 29. However, the original of that letter must have gone astray, for it has not yet reached me.

We must have an original document to submit to the court. It is not clear from the statute what form certificate is to take, but it is to be inferred that something in the form of an official document is anticipated.

The Connecticut statute is copied from the Miller Act, which requires the Comptroller General to certify the date of final settlement of federal contracts. I am attach- [R. 42] ing for your consideration a certificate in form and content of the certificates issued by the Comptroller General. The Comptroller General always attached his seal to authenticate its execution.

Some judge might rule that an official document which is officially authenticated is required. I think the attached form would certainly be acceptable. If the Highway Commissioner has a seal, it might be well to attach it."

48. Mr. Beasley enclosed a form of certificate (Ex. LL) with his letter (Ex. GG) which reads as follows:

"Certified Statement Of Date Of Final Settlement Of Contract Having been specially designated by the State Highway Commissioner to make such certified statement, I do hereby certify, in accordance with provisions of section 49-43, Connecticut General Statutes, that final settlement of the con-

tract, dated January 31, 1956, between the State Highway Commissioner, acting as agent for the State of Connecticut, and Terry Contracting, Inc. for construction of Superstructure, Bridgeport Harbor Bridge, on Connecticut Turnpike, in the Town of Bridgeport, Project Number 311-02, S.W.O. Number 311-04, was made April 14, 1960.

Dated this fourth day of April, 1962.

Walter J. Schuler
Chief Engineer"

49. Thereafter Mr. Beasley determined that Connecticut General Statutes Revision 1949 Section 7216 required the Attorney General, not the Highway Department to certify as to the date of "final settlement."

50. On May 2, 1962, Mr. Beasley wrote the Connecticut Highway Department the following excerpt from letter (Ex. MM):

"In accordance with our telephone conversation of May [R. 43] 1, I am sending you by Mr. Christensen draft copies of a Certified Statement of Date of Final Settlement of the contract between Terry Contracting, Inc. and the State of Connecticut which is shown in the caption. This draft copy is for execution by the Attorney General in order to have a full compliance with the provisions of Section 7216 of the General Statutes, Revision 1949, Section 49-43 in the Revision of 1958 which require certification by the Attorney General. Mr. Christensen is also bringing with him the original certificate signed by Mr. Schuler on April 5, 1962 for

ready reference to the date in the event you do not have the date handy.

I understand that you will arrange with the Attorney General to execute this Certified Statement promptly."

51. The "original certificate signed by Mr. Schuler on April 5, 1962" referred to in Ex. MM is identical to Ex. LL.

52. A form of certificate (Ex. MM), identical in all respects to the Attorney General's certificate (Ex. 1) except as to signature and date of execution, was prepared by Mr. Beasley and was delivered together with Ex. GG to the Attorney General's office by a representative of the defendant Aetna on May 2 or May 3, 1962.

53. Exhibit 1 bears the facsimile signature of Attorney General Coles on the form prepared by Mr. Beasley.

54. Assistant Attorney General Neusner responding to a subpoena served on the attorney general testified that aside from an unexecuted copy of Exhibit 1, a letter dated March 29, 1962 from the Highway Department to Aetna (Ex. GG) and a calling card from an Aetna representative, the Attorney General's office found no other documents in the Attorney General's file referring in any way to a final settlement of the Bridgeport Harbor Bridge project and that he did not know what, if any, investigation had been undertaken by the Attorney General's office with respect to the topic of a final settlement on the Bridgeport Harbor Bridge project prior to May 3, 1962.

Appendix F

JURISDICTIONAL FACTS

Pleadings

Substituted Answer

[R. 6] First Special Defense

1. The bond on which suit is brought was furnished pursuant to Section 7214 of the General Statutes of Connecticut, Revision of 1949 (now Section 49-41 of the General Statutes, Revision of 1958).

2. This suit was instituted pursuant to Section 7215 of said statutes (now appearing as Section 49-42 of the 1965 Supplement to the General Statutes of Connecticut, Revision of 1958).

3. The "date of final settlement" of the contract with reference to which said bond was furnished was April 14, 1960 as appears from the certified statements of the Attorney-General and the State Highway Commissioner of the State of Connecticut, copies of which are attached hereto as Exhibits 1 and 2 respectively and the originals of which will be filed in Court.

4. This suit was commenced more than one year after said date of final settlement, to wit, on March 23rd, 1962.

Substituted Reply

Fourth Reply in Avoidance of the First Special Defense:

[R. 11] 3. The manner, methods and standards employed by the State of Connecticut in establishing the alleged date of "final settlement" are vague, indefinite, un-

formulated, arbitrary and capricious, and the use of said manner, methods and standards in establishing the alleged date of "final settlement" herein deprived plaintiff of its rights to due process of law within [R. 12] the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Article First, Section 12, of the Constitution of the State of Connecticut.

[R. 13] Sixth Reply in Avoidance of the First Special Defense:

The means, methods, standards and procedures employed by the Highway Department and/or the Attorney General in determining, certifying and applying the date of final settlement which is alleged in paragraphs 3 of the First Special Defense to contracts entered into between the plaintiff, the defendants, the State of Connecticut and Terry Contracting, Inc. during 1956 and 1957 impair the obligation of said contracts, contrary to Article First of the Constitution of the State of Connecticut and Article First, Section 10, and the Fourteenth Amendment to the Constitution of the United States.

Claims of Law

[R. 48] The plaintiff made the following claims of law respecting the judgment to be rendered, upon which the Court ruled as hereinafter stated:

[R. 54] 112. Due process of law under Article First, Section 12 of the Constitution of the State of Connecticut and the Fifth and Fourteenth Amendments of the Constitution of the United States of America requires effective notice to persons vitally interested in administrative determinations which could commence the running of a period

for the assertion of their rights. Hubbard v. Planning & Zoning Commission, 151 Conn. 269, 272-273 (1963); Lambert v. California, 335 U. S. 225, 228 (1957).

113. When the identity of the interested persons is known there arises a Constitutionally imposed duty to communicate actual personal notice. Mullane v. Central Hanover Tr. Co., 339 U. S. 306, 313-319 (1950); Schroeder v. City of New York, 371 U. S. 208, 212-213 (1962); Walker v. Hutchinson City, 352 U. S. 112, 115-116 (1956).

114. If a public officer fails to give a required notice, third parties cannot acquire rights at the expense of the persons who failed to receive the required notice. In re Romanac, 245 F. Supp. 882 (W. D. Va. 1965); National Bank & Trust Company v. Allied Supply Company, 386 F. 2d 225 (4th Cir. 1967): Chidley's Appeal from Probate, 8 Conn. Sup. 260 (1940).

115. The Statute of Limitations in Section 49-43 is for the benefit of sureties. It is not Constitutionally effective unless the Attorney General performs the duties imposed on him under Section 49-43. If he fails to give the certification which due process and common sense require him to give to materialmen who have filed the statutory affidavit, the only reasonable result is that the statutory period does not run against such materialmen. Notice and the opportunity to act [R. 55] upon it must be granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U. S. 545, 552 (1965).

[R. 59] 131.* Once the defendants' sureties came forward and executed a payment bond, contract rights

*Part of corrected finding.

were created in favor of persons such as plaintiff who furnished labor and materials. Those rights are protected by the United States and Connecticut Constitutions against the impairment or deprivation by anyone (including the sovereign) without due process of law. International Steel Co. v. Surety Co. (supra).

JAMES E. MURPHY,
State Referee.

Assignment of Errors

[R. 57]

The Court erred:

5. In failing to find that plaintiff made the claims of law respecting the judgment to be entered which said claims are set forth in paragraphs 130 thru 132 inclusive of the Draft Finding which is admitted and undisputed.

6. In refusing to rule on or in overruling the claims of law stated in paragraphs 78 thru 128 inclusive of the Limited Finding.

7. In rendering judgment for the defendants.

Plaintiff-Appellant,
BALDMIN-LIMA-HAMILTON CORPORATION,
By CUMMINGS & LOCKWOOD,
Its Attorneys.

Filed Oct. 2, 1970.

Appendix F

Supreme Court

OF THE

STATE OF CONNECTICUT

BRIEF OF PLAINTIFF-APPELLANT

[p. 1]

STATEMENT OF ISSUES

1. Was this subcontractor's suit against the sureties on a payment bond timely, where the amount due the prime contractor was not finally fixed and determined as far as the state was concerned until the prime contractor's claim for extras was denied, less than one year prior to suit?

2. Where, after a subcontractor had brought a timely suit on a payment bond, defendant's counsel obtained, *ex parte*, a certificate of the Attorney General specifying a date of final settlement of the prime contract which would indicate that the suit is untimely, and on the undisputed facts of record the certificate is erroneous as a matter of law, is the court precluded from correcting or setting aside the erroneous certificate by a statutory provision purporting to make it "conclusive" upon the parties?

* * *

[p. 19]

It is important to note that in most cases in which a statute clothes an administrative determination with finality or conclusiveness upon the parties, there has already been some form of application submitted to the administrative body or hearing held by it in which the interested parties have had an opportunity to present their claims of law and fact for consideration. Here there was no such opportunity

[p. 20]

—even though the determination by the Attorney General was not made until after the case was in progress.

The concept of a quasi-judical determination carries with it as a matter of due process of law the fundamental right to be heard at least once at some point in the proceedings. *Connecticut Mutual Life Insurance Company* v. *Rogers,* 113 Conn. 14, 17 (1931); *Brein* v. *Connecticut Eclectic Examining Board,* 103 Conn. 65, 85 (1925). We submit that this right to be heard is particularly important where counsel for one of the parties has, whether innocently or not, injected himself *ex parte* into the quasi-judicial process.

In *Connecticut Mutual Life Insurance Company* v. *Rogers, supra,* the court expressly rejected defendant's claim that a statute making an administrative decision "conclusive" deprives the court of its inherent power to correct an administrative decision having "an erroneous basis" especially where such determinations are made without hearing or notice to interested parties.

> "[T]he provision that action by the board shall be 'conclusive' does not mean that it is not open to attack by any company adversely affected by it. Indeed as such [administrative determinations] . . . are made without notice to it or any opportunity to be heard, the statute would be, to say the least, open to serious question upon constitutional grounds, if the word 'conclusive' was given the meaning claimed by the respondent." (113 Conn. at 17)

SUBJECT INDEX

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ARGUMENT 2

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Point II. This Court has no power to revise judgments of state courts on questions of state law. 3

Point III. This Court will not review decision of state court, unless federal question was presented and decision of federal question was necessary to its jurisdiction of case, and it was actually decided. 4

Point IV. This Court will not take jurisdiction to review federal question not properly raised in trial court, and pursued in highest state court as provided by state procedure. 5

Point V. The question involved in case is moot, and this Court will not review moot questions. . 6

Point VI. Petitioner never asked for hearing before Attorney General to have certified date of settlement changed, and petitioner did not exhaust its administrative remedies. 7

Point VII. No Fourteenth Amendment requirement for notice and hearing in determining final settlement of contract, and certified date of final settlement was obtained in statutory manner. . 7

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STATEMENT OF THE CASE

Respondents accept petitioner's statement of the case, except for inaccuracies and omissions noted below.

The record shows that the statutory bond was given, and that it was conditioned as required by the statute (Pet. B-2, 3, 5).

The record also shows that respondents made the application and affidavit, and obtained the certified statement of the date of final settlement of the contract, in strict compliance with C.G.S., § 7216 (Pet. E-4 - E-7).

There is no evidence in the record to justify the statement that the Attorney General issued the certified statement of the date of final settlement "without conducting any investigation of the facts" (Pet. p. 5). In the absence of evidence to the contrary, the Attorney General is presumed to have performed his statutory duty, and to have relied upon the information furnished to him by the Highway Department, which was the agency having the contract in charge.

As the record clearly shows, at no time either in the trial court or in the appeal, did petitioner present any question that C.G.S., § 7216 was repugnant to the Constitution of the United States.

ARGUMENT

Point I.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rule 19, Supreme Court Rules, 28 U.S.C.A.; 28 U.S.C.A., § 1257 (3);

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73-74, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

Rule 19, which is not mentioned in the petition, provides in § 1, subsection (a), that a reason for granting review on writ of certiorari is where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

As we shall demonstrate below, the Supreme Court of Connecticut has not decided a federal question at all, much less a federal question of substance.

28 U.S.C.A., § 1257 (3), provides that this Court may review judgments rendered by the highest court of a State in which a decision could be had, by writ of certiorari, where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

As we shall also demonstrate below, the validity of the state statute was at no time drawn in question on the ground of its being repugnant to the Constitution of the United States, and petitioner never claimed any right under the Constitution of the United States, either in the trial court or on the appeal.

In *Rice v. Sioux City Memorial Park Cemetery, supra,* this Court lays at rest all of petitioner's arguments for review. In discussing Rule 19 and the considerations governing review on certiorari, this Court said:

> "A federal question raised by petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (Magnum Import Co. v. Coty, 262 U.S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S. Ct., v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Petitioner states only that it invokes the jurisdiction of this Court under 28 U.S.C.A., § 1257 (3), but it has not stated any of the grounds prescribed by § 1257 (3) on which this Court may review the final judgment of the Supreme Court of Connecticut by writ of certiorari.

Point II.

Petitioner's five-page statement of "Reasons for Granting Writ" is simply a statement of the reasons why petitioner thinks the case was wrongly decided by the Supreme Court of Connecticut. This Court has no power to revise judgments of state courts on questions of state law.

Hamblin v. Western Land Co., 147 U.S. 531, 13 S. Ct. 353, 37 L. Ed. 267 (1893);

Thomas v. Iowa, 209 U.S. 258, 28 S. Ct. 487, 488, 52 L. Ed. 782 (1908);

Preston v. Chicago, 226 U.S. 447, 33 S. Ct. 177, 57 L. Ed. 293 (1913);

Scripto v. Carson, 362 U.S. 207, 210, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960);

Henry v. State of Mississippi, 379 U.S. 443, 446-447, 85 S. Ct. 564, 567, 13 L. Ed. 2d 408 (1965).

Argument of the type made by petitioner in its statement of "Reasons for Granting Writ", standing alone, is seldom persuasive to the exercise of this Court's certiorari jurisdiction. See Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 551 (1958).

Point III.

Before this Court will review a decision of a state court, it must affirmatively appear from the record, not only that a federal question was presented to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to its jurisdiction of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Lynch v. New York, 293 U.S. 52, 54, 55 S. Ct. 16, 17, 79 L. Ed. 191 (1934);

Honeyman v. Hanan, 300 U.S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 476 (1937).

Where the judgment of the state court might rest on two grounds, one involving a federal question, and the other a state ground, and if the state ground is sufficient to sustain the judgment, this Court will not take jurisdiction to review that judgment.

Klinger v. State of Missouri, 13 Wall. 257, 263, 20 L. Ed. 635, 637 (1872);

Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 297, 11 S. Ct. 528, 35 L. Ed. 193 (1891);

Allen v. Arguimbau, 198 U.S. 149, 154-155, 25 S. Ct. 622, 49 L. Ed. 990 (1905);

Lynch v. New York, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934);

Dorley v. Mayo, 351 U.S. 277, 281, 76 S. Ct. 806, 100 L. Ed. 1178 (1956), rhg. denied, 352 U.S. 859, 77 S. Ct. 22 (1956).

Although petitioner asserted a claim of due process of law in the trial court pleadings (Pet. F-1, 2), it was not pressed in the trial court, for the trial court's opinion does not mention it (Pet. B-1-5)

It was not an issue presented to the Supreme Court of Connecticut, for the court's rule requires the appellant's brief to contain "a concise statement setting forth without detail or discussion the principal issue or issues involved in the appeal." Connecticut Practice Book, § 713. It was not stated as an issue involved in the appeal as shown by the "Statement of Issues" in petitioner's brief for the Supreme Court of Connecticut (Pet. F-5). Petitioner's brief makes only a passing reference to "due process" (Pet. F-6).

There is no mention of any federal question or any constitutional right in the decision of the Supreme Court of Connecticut. A federal question which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not survive as a basis for review by this Court. *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906); *United States Fidelity & Guaranty Co. v. Oklahoma*, 250 U.S. 111, 39 S. Ct. 399, 63 L. Ed. 876 (1919).

Point IV.

This Court will not take jurisdiction to review a federal question which was not properly raised before the trial court, and pursued on appeal to the highest state court, as provided by state procedure. *Beck v. Washington*, 369 U.S.

541, 549-554, 82 S. Ct. 955, 959-962, 8 L. Ed. 2d 98 (1962). Having raised and abandoned its Fourteenth Amendment claim to due process, petitioner cannot now revive it. *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 313, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), n. 6, as explained in Mr. Justice Harlan's dissent, at pages 333-336, 88 S. Ct., at pages 1616-1618.

Point V.

The question involved in this case has become academic and moot, and this Court will not review questions which have become moot.

> *United States v. Alaska S.S. Co.*, 253 U.S. 113, 40 S. Ct. 448, 64 L. Ed. 808 (1919);
>
> *Berry v. Davis*, 242 U.S. 468, 37 S. Ct. 208, 61 L. Ed. 441 (1917);
>
> *Natural Milk Producers Assn. v. San Francisco*, 317 U.S. 423, 63 S. Ct. 359, 87 L. Ed. 375 (1942);
>
> *Doremus v. Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952).

The Connecticut Statute involved in this case has been amended to eliminate the "date of final settlement of the contract" as starting the period of limitation for bringing action on the bond, and to limit the time for bringing action to one year from the date of furnishing the last of the labor or furnishing the last of the material, by 1969 Public Act 192, §§ 1, 2, which amendment coincides with an amendment to the Miller Act., 40 U.S.C. §§ 270b (b), 270c, in 1959.

Except for the parties to this action, there would be no precedental value in a decision by this Court. This Court does not sit to satisfy an academic interest in certain issues. Nor does it sit for the benefit of particular litigants.

See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

Point VI.

Although there is federal precedent for the Attorney General to alter or amend his original determination of the date of final settlement of the contract, as the Comptroller General did, in *United States Fidelity & Guaranty Co. v. Hendry Corporation*, 391 F. 2d 13, 15 (5th Cir. 1968), certiorari denied, 393 U.S. 978, 89 S. Ct. 446, 21 L. Ed. 2d 439, the record in this case is barren of any evidence that petitioner asked for a hearing before the Attorney General, or tried in any way to have him change his original certified statement of the date of final settlement of the contract. Therefore, petitioner has failed to exhaust its administrative remedies, which is another reason why this Court will not review the decision of the Supreme Court of Connecticut.

Point VII.

There is no Fourteenth Amendment requirement for a hearing before the government makes up its mind what it owes on a contract. "What in fact it is required to pay is not in question in establishing a final settlement" (Opinion of Supreme Court of Connecticut, Pet. C-8). Respondents applied for, and obtained from the Attorney General, a certified date of final settlement of the contract *ex parte*, in precisely the manner contemplated by the statute, which authorized an administrative officer to conclusively determine a specific fact, without requiring either notice or hearing. C.G.S., § 7216, Rev. 1949, § 49-43, Rev. 1958. The statute does not call for the exercise of any quasi-judicial function.

In certifying the date of final settlement of the contract, the Attorney General, by federal analogy, performed an

administrative act within his absolute, unreviewable discretion.

United States Fidelity & Guaranty Co. v. Hendry Corporation, 391 F. 2d 13, 15 (5th Cir. 1968), certiorari denied, 393 U.S. 978, 89 S. Ct. 446, 21 L. Ed. 439;

Peerless Casualty Co. v. United States, 241 F. 2d 811 (1st Cir. 1957).

CONCLUSION

Petitioner has failed to show more than a private dispute between private parties with respect to a statutory right of action under State law. It has not established any grounds for review by writ of certiorari, either under Supreme Court Rule 19, or 28 U.S.C.A., § 1257 (3), and the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elmer W. Beasley, counsel for The Ætna Casualty & Surety Company, American Employers' Insurance Company, and Employers' Fire Insurance Company, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of December, 1972, I served three copies of the foregoing brief for respondents in opposition to the petition for a writ of certiorari upon petitioner, by depositing three copies of said brief in the United States mail, first class, postage prepaid, to petitioner's counsel, Francis J. McNamara, Jr., Cummings & Lockwood, One Atlantic Street, Stamford, Connecticut, 06904.

ELMER W. BEASLEY,
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DEC 27 1972

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-674

BALDWIN-LIMA-HAMILTON CORPORATION,
Petitioner,

—versus—

THE AETNA CASUALTY & SURETY CO., AMERICAN EMPLOYERS' INSURANCE COMPANY and EMPLOYERS' FIRE INSURANCE COMPANY,
Respondents.

PETITIONER'S REPLY BRIEF

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BALDWIN-LIMA-HAMILTON CORPORATION,
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Respondents.

PETITIONER'S REPLY BRIEF

Petitioner replies to the points in Respondents' brief in the order in which they are raised.

POINT I

The petition for certiorari challenges the action of the Supreme Court of Connecticut in adopting as conclusive an administrative determination of fact obtained *ex parte* without notice or hearing. The Connecticut statutes involved are silent on the right to notice or hearing. The petitioner, therefore, does not challenge the validity of any

statute on its face, but rather attacks the administrative and judicial actions of the State of Connecticut which contravened petitioner's basic right to notice and hearing under the Fourteenth Amendment to the United States Constitution.

POINT II

The Connecticut Supreme Court has held that Connecticut state law authorized the trial court to give conclusive effect to an *ex parte* administrative determination. We do not ask this Court to "revise" the Connecticut Court's interpretation of state law. We ask that it declare the procedure sanctioned by the Connecticut Court to be a violation of petitioner's right to procedural due process.

POINTS III AND IV

It is undisputed that the petitioner's Fourteenth Amendment claim relating to notice and hearing was raised in the pleadings. (App. to Pet. F-1—F-2). Respondents state that the due process issue must be deemed not to have been pressed in the trial court because it was not mentioned in that Court's opinion. This is not correct. Under Connecticut practice the trial court is required to set forth in its finding the claims of law made by the appellant and overruled at trial. Conn. Prac. Book (1963) §§ 635, 652. Petitioner's due process claims under the Fifth and Fourteenth Amendments to the Constitution of the United States appear in paragraphs 112-115 and 131 of the finding (App. to Pet. F-2—F-4) and include, specifically, the following:

> "Notice and the opportunity to act upon it must be granted at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965)." (App. to Pet. F-3, par. 115)

With respect to the claim that the issue was not raised on appeal as required by the Connecticut Practice Book or

argued in the Supreme Court, we refer the Court to the Appendix to the Petition, F-4—F-6. The overruling of petitioner's constitutional claims was assigned as error (App. to Pet. F-4); the STATEMENT OF ISSUES in petitioner's brief in the Connecticut Supreme Court expressly refers to the *"ex parte"* nature of the certificate of the Attorney General (App. to Pet. F-5); and the due process issue was briefed (App. to Pet. F-6). The Connecticut Supreme Court chose not to discuss this and other claims made by petitioner, holding that "the correctness of the [Attorney General's] decision is not at issue." (App. to Pet. C-8)

We frankly cannot follow respondent's argument about a possible state law basis for the Connecticut Supreme Court's decision. The court below flatly refused to consider the *merits* of petitioner's argument to the effect that the date of final settlement occurred on April 3, 1961 when the prime contractor's claim for extras was denied. Instead the Court rested its decision squarely on the proposition that petitioner had no right to be heard at all with respect to the question of when final settlement occurred. In refusing to review the certificate, the Court necessarily rejected petitioner's contention that conclusive effect could not constitutionally be given to an administrative determination made without notice and hearing.

POINT V

The issue raised by the petition for certiorari is clearly not "moot." Petitioner has been deprived of a contractual right which, with interest, has a value in excess of $1,000,000.

The fact that the Miller Act and Connecticut's "Little Miller Act" have both been amended to eliminate the cumbersome certification procedure involved in the present case is immaterial. The issue is whether petitioner has been deprived of its constitutional rights.

Questions involving a person's *fundamental* right to notice and hearing prior to adjudication of his rights have always been of the utmost importance to this Court (see Pet. pp. 11-12). Numerous state and federal statutes purport to clothe public officials with the power to make conclusive decisions affecting private rights. This Court should declare that where such a statute does not provide for notice and hearing, the federal Constitution affords such a right.

POINT VI

The Connecticut statutes provided no administrative remedy by which petitioner could have sought review by the Attorney General of his own certificate. Furthermore, there was no statute of general application providing for either administrative or judicial review of administrative decisions.

POINT VII

Petitioner has never claimed that it should be heard with respect to how much the government owes a contractor. It has no interest in that issue. It does have a vital interest in a subsequent determination of the *date* on which final settlement occurred when that determination is made for the sole and exclusive purpose of establishing whether petitioner is barred from pursuing its contractual rights against sureties on a payment bond.

Respectfully submitted,

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